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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CLAYTON L. WILLIAMS, Defendant and Appellant.	B264896 (Los Angeles County Super. Ct. No. SA033466)

APPEAL from an order of the Superior Court of the County of Los Angeles, Mark Windham, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General and Theresa A. Patterson, Deputy Attorney General, for Plaintiff and Respondent.

Penal Code section 1170.15[1] is a an alternative sentencing scheme that requires a trial court, when imposing a consecutive sentence on a subordinate felony, to impose the full middle term (as opposed to one-third the middle term) if the defendant is also convicted of dissuading a witness (§ 136.1) from reporting that felony.

Defendant and appellant Clayton Williams appeals from the trial court's order denying his motion for resentencing. According to defendant, the trial court violated his Sixth Amendment right to a jury trial and his right to due process when it corrected a previously imposed sentence on a subordinate term such that, pursuant to section 1170.15, it increased the term for that offense from one-third the middle term to a full middle term. Specifically, he argues the constitutional deprivations stem from the trial court's decision to increase the term without having a jury first determine that his conviction for dissuading a witness related to the subordinate felony.

Defendant did not raise this issue in the trial court and, as a consequence, the contention is forfeited. We affirm the trial court's order.

FACTUAL BACKGROUND[2]

John Manes and defendant were two homeless men who lived in a Santa Monica park. At approximately midnight on July 27, 1998, defendant attacked Manes because a friend of

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1 All statutory references are to the Penal Code.

2 The factual background is taken from the unpublished opinion in case number B130176 that affirmed defendant's judgment of conviction.

Manes named Steve had sprayed defendant with a can of pepper spray that belonged to Manes. Defendant kicked Manes 10 to 15 times in the face, ribs, and stomach, and hit Manes with his fists. Defendant warned Manes to get out of the park and not return, threatening to "finish the job" if Manes returned to the park. Manes left the park and hid under the stairway of an apartment building. There he was discovered by Steve who ultimately called 911, and Manes was taken to the hospital. Manes suffered a fracture of the bones around the left eye and a subdural hematoma on the right side of the head. A large portion of the skull was surgically removed to evacuate the clot; and the skull was reconnected by means of metal plates and screws, and the two layers of the scalp were closed with multiple sutures or staples. When Manes was released from the hospital on August 10, 1998, half his head was shaved, he had a surgical scar six to eight inches long from the tip of his forehead to his right ear, both eyes were swollen, and there was a resolving bruise over the right side of his face.

Manes returned to the park August 14, 1998, to recover clothes and money. Manes remained in the park because his friends reassured him he would be safe from defendant. On August 17, 1998, however, defendant attacked Manes again. Defendant rammed his bicycle into Manes's back and legs. Defendant accused Manes of being up to his old tricks and never being able to learn. Defendant tackled Manes and began hitting him with his fists. When Manes sprayed defendant with pepper spray, defendant retreated to the bathrooms. Manes could barely see because of the pepper spray. Another park resident led Manes away from the park and into an alley for safety.

Defendant caught up to Manes in the alley and told him, "'Don't hide behind the pepper spray. Come on and box like a man.'" Defendant started to attack Manes. Manes sprayed defendant, enraging defendant. Defendant hit Manes in the legs with defendant's bicycle. The hat that Manes was wearing came off. Defendant persisted in the attack, despite being sprayed with pepper spray: Manes would spray defendant and defendant would momentarily back away; and defendant would resume the attack and Manes would spray him again. "[Defendant] kept coming. He was relentless. He kept saying, 'You are going to run out of pepper spray. I'm just going to keep coming until . . . you run out.'"

The pepper spraying ended when defendant tackled Manes to the ground in some bushes. Defendant kicked and hit Manes, who was on his hands and knees. Defendant bent over "to specifically hit [Manes] in the face by leaning over and punching upwards into [his] face. Like an upper cut." Defendant hit Manes's head, right and left side, with his clenched fist five to eight times. Defendant kicked the right side of Manes's head, right eye, and ribs. Defendant hit and kicked Manes with such force, "[i]t was like he was trying to kill [Manes]. It was crazy. It was—It was violent force. As strong as he could hit [Manes] . . . ."

The beating was observed by motorists, neighbors, and passersby. Defendant was "punching Manes heavily on his head and pushing his head down into something." Defendant pummeled Manes's head with both hands, fists clenched. Defendant gave Manes "a real pounding." A jogger thought defendant was trying to kill Manes. "All I thought is he was going to kill him. [¶] . . . There was blood. . . . The blood was dreadful." Defendant held Manes up with one hand and violently

hit him with his other fist 15 times. "He was using what we would call leveraging. His hips—he was into it fully. He was trying to—he was trying to, it appeared, to almost kill the man." He struck Manes whipping his clenched right fist back and forth across his face. "It was . . . a continual heavy hitting." Manes was defenseless: he could not get his hands up. The attack stopped when a man approached, yelling as loudly as he could, "'Stop hitting the man. You are going to kill him.'" Defendant then backed away and ran.

Manes encountered defendant again a short time later. Defendant warned Manes that if he said anything to the police, who were approaching, "[Manes] was a dead man."

The beating opened Manes's surgical incision, and Manes bled profusely. He was covered with blood to his waist. "He was unrecognizable. He was just a bloody mess." "His whole face was just blood."

Defendant was arrested. His clothes were spattered with Manes's blood.

PROCEDURAL BACKGROUND

On count 1—attempted murder—a jury found defendant guilty of the lesser included offense of assault with a deadly weapon in violation of section 245, subdivision (a)(1); on count 2 of attempted murder in violation of sections 664 and 187, subdivision (a)(1); and on count 3 of dissuading a witness by force or threat in violation of section 136.1, subdivision (c)(1). The jury also found true the allegations that defendant inflicted great bodily injury in the commission of the assault and attempted murder counts. And, following a court trial on the prior conviction allegations, the trial court found true the allegation

that defendant had suffered a prior serious felony conviction within the meaning of sections 1170.12, subdivision (a) through (d) and 667, subdivisions (b) through (i) and a conviction of a prior felony for which a prison term had been served within the meaning of section 667.5, subdivision (b).

The trial court sentenced defendant to an aggregate prison term of 27 years, comprised of the following terms: on count 2, attempted murder—which the trial court selected as the principal term—a middle term seven-year sentence, doubled to 14 years pursuant to the Three Strikes law, plus a consecutive three-year term for the great bodily injury enhancement and a consecutive five-year term for the prior prison term enhancement; on count 1, assault with a deadly weapon, a consecutive one-third the middle term sentence of one year, doubled to two years pursuant to the Three Strikes law, plus one year for the great bodily injury enhancement; and on count 3, dissuading a witness by force or threat, a consecutive one-third the middle term sentence of one year, doubled to two years pursuant to the Three Strikes law.

In October 2013, the Department of Corrections sent the trial court a letter advising it of a potential sentencing error. According to the Department, the subordinate consecutive one-third the middle term sentence on count 1 should have been a full term sentence under section 1170.15.[3]

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[3] Section 1170.15 provides: "Notwithstanding subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 or 137 and that was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to

On September 4, 2014, the trial court held a resentencing hearing.[4] Consistent with section 1170.15, the trial court

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give material information pertaining to, the first felony, or of a felony violation of Section 653f that was committed to dissuade a witness or potential witness to the first felony, the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed, and shall include the full term prescribed for any enhancements imposed for being armed with or using a dangerous or deadly weapon or a firearm, or for inflicting great bodily injury."

[4] Our dissenting colleague submits the trial court had no jurisdiction to alter the original sentence. Although a trial court's jurisdiction to resentence is limited, such jurisdiction exists if, for example, it determines the original sentence (a) did not comport with statutory mandates (see *People v. Grimble* (1981) 116 Cal.App.3d 678, 685) or (b) was contrary to the sentencing court's express intention (see *People v. Jack* (1989) 213 Cal.App.3d 913, 916). In passing, defendant concedes in his opening brief the original term on count 3 should have been governed by section 1170.15, i.e., he agrees that sentence was illegal. Also, there are references in the record of the original sentencing hearing that give the impression the length of the middle term for count 1 was triggered by the clerk's suggestion that it was governed by section 1170.1 and/or the trial court's unfamiliarity with section 1170.15. In any event, a jurisdictional issue was not raised by defendant (in the trial court or on appeal), or addressed by the Attorney General. Thus, we decline to consider it further. (See Gov. Code, § 68081 ["Before . . . a court of appeal . . . renders a decision . . . based upon an issue which was not proposed or briefed by any party to the proceeding,

imposed on count 1 a full consecutive middle term of three years, doubled to six years pursuant to the Three Strikes law, plus a full three-year enhancement for the great bodily injury finding under section 12022.7 for a total sentence on count 1 of nine years, rather than the two years, plus one year, that was originally imposed. On count 3, dissuading a witness, the trial court imposed a full consecutive middle term sentence of three years, doubled to six years pursuant to the Three Strikes law, rather than the two years that were originally imposed. The total aggregate sentence imposed was 37 years, rather than the 27 years that had been originally imposed.

On September 8, 2014, the trial court recalled defendant's sentence on its own motion. The trial court reduced the sentence on count 2, the principal term, from a full middle term sentence of seven years to a full low term sentence of five years, doubled to 10 years pursuant to the Three Strikes law, plus a three-year term for the great bodily injury enhancement, plus an additional five-year term for the prior prison term enhancement. Because the sentences on counts 1 and 3 were not changed, the resulting aggregate sentence was 33 years.

In May 2015, defendant moved in pro per for resentencing, seeking a reinstatement of his original 27-year sentence. The trial court denied the motion and ordered defendant's counsel to file a notice of appeal.

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the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing"].)

DISCUSSION

Defendant contends that the trial court violated his Sixth Amendment jury trial right and due process right when it imposed a full term sentence on count 1. He claims he was entitled to have a jury determine whether the count 3 conviction for dissuading a witness related to the assault with a deadly weapon offense in count 1. In other words, defendant is concerned that he was convicted of dissuading a witness only from reporting the attempted murder offense (count 2) and not for dissuading a witness from reporting the assault offense (count 1). We agree with the Attorney General that defendant's contention is forfeited.

A. Legal Principles

"The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 37, pp. 497-500.) The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon* (2001) 25 Cal.4th 1082 [108 Cal.Rptr.2d 385, 25 P.3d 598] (*Simon*): '"'"The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ."'" [Citation.] '"No procedural principle is more familiar to this Court than that a *constitutional* right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." . . .' [Citation.] [¶] 'The rationale for this rule was aptly explained in *Sommer v. Martin*

(1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . . : "'In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'" [Citation.]" (Fn. omitted; [citations].)' (*Simon, supra*, 25 Cal.4th at p. 1103, italics added.)" (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265.)

B. Analysis

Defendant acknowledges he did not raise the issue in the trial court, but argues the forfeiture doctrine does not apply because his sentence is unauthorized and, therefore, can be corrected at any time, including on appeal. Defendant does not link the alleged constitutional errors to the imposition of a sentence that was "unauthorized." Rather, defendant argues the sentence was unauthorized because neither the jury nor the trial court made findings that the conviction for dissuading a witness related to count 1. Defendant has misconstrued the unauthorized sentence exception to forfeiture.

"'[T]he "unauthorized sentence" concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]' [Citation.] '[A] sentence is generally "unauthorized" where it could not lawfully be imposed under any circumstance in the particular case.' [Citation.] 'An

obvious legal error at sentencing that is "correctable without referring to factual findings in the record or remanding for further findings" is not subject to forfeiture.' [Citation.]" (*People v. Anderson* (2010) 50 Cal.4th 19, 26.)

The record does not show the sentence on count 1 was unauthorized. The facts underlying the conviction on count 1 involved a violent assault committed against Manes. Three weeks after that assault, defendant attacked Manes once again, this time so severely as to justify a conviction for attempted murder. Immediately after the second attack, defendant broadly dissuaded Manes from speaking to the police. Defendant has not demonstrated section 1170.15 could not apply to count 1 "under any circumstances" in this case. Indeed, it seems fairly obvious that defendant intended to convince Manes not to report either of the two violent attacks. The unauthorized sentence exception to forfeiture is not applicable. The appellate contention is forfeited.[5]

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[5] Defendant appears to alternatively suggest the sentence was unauthorized pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*). We are not persuaded. *Apprendi* held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Ibid.*) Section 1170.15 constitutes an alternative sentencing scheme, not an enhancement. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1834.) It does not increase the sentence beyond the statutory maximum.

The jury found defendant committed felonies against Manes and that defendant dissuaded Manes from reporting "such victimization" to the police. These findings triggered the application of section 1170.15 without violating the rule announced in *Apprendi*.

DISPOSITION

The trial court's order denying defendant's motion for resentencing is affirmed.

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KUMAR, J.*

I concur:

TURNER, P. J.

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* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BAKER, J., Dissenting

The majority holds defendant Clayton Williams forfeited the issue he raises on appeal, reasoning "[d]efendant has misconstrued the unauthorized sentence exception to forfeiture." Specifically, the majority believes defendant has not shown Penal Code section 1170.15 cannot under any circumstances apply to his assault conviction because it "seems fairly obvious" defendant intended to dissuade victim John Manes from reporting either of defendant's attacks, i.e., the first attack in July 1998 and the second attack roughly a month later. In other words, the majority believes the unauthorized sentence exception to forfeiture does not apply because the trial court could reasonably decide defendant intended to dissuade Manes from reporting both crimes, not just the second attack.

I believe that is true, but the majority does not follow its reasoning through to its logical conclusion. Reversal of the recently modified judgment is required without need to reach the merits of defendant's contentions because the trial court had no proper jurisdictional basis to resentence defendant on the count 1 assault conviction 14-plus years after he was originally sentenced—which was long after execution of his original sentence had begun. (*People v. Howard* (1997) 16 Cal.4th 1081, 1089 ["[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun"].)

None of the accepted justifications for resentencing a defendant after a sentence becomes final applies in this case. It is well-established that trial courts may at any time correct clerical errors made during sentencing, but the trial court's

resentencing of defendant cannot fairly be characterized as correction of a mere clerical error. (*In re Candelario* (1970) 3 Cal.3d 702, 705.) Trial courts may also correct an unauthorized sentence at any time, but by the majority's own reasoning, the trial court's original sentence on count 1 was not unauthorized. While it is fairly obvious to the majority that defendant intended to dissuade the victim from reporting both attacks by defendant, that is a judgment made in the exercise of judicial discretion; there is no basis to hold that the count 1 assault sentence the trial court originally imposed in 1999 "could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354; accord, *People v. Smith* (2001) 24 Cal.4th 849, 852 [later intervention in case of an unauthorized sentence is appropriate because errors presented are ""clear and correctable" independent of any factual issues presented by the record at sentencing' [Citation]"].) Finally, Penal Code section 1170 provides a statutory basis for a court to recall a sentence on its own motion, but that remedy can be invoked only within 120 days after committing a defendant to prison, and only to reduce, not increase, the defendant's sentence. (Pen. Code, § 1170, subd. (d); *Dix v. Superior Court* (1991) 53 Cal.3d 442, 455.)

I see no proper legal basis that would permit the trial court to resentence defendant on the count 1 assault conviction after receiving the letter from the Department of Corrections and Rehabilitation in 2013, which was well over a decade after defendant was originally sentenced. I accordingly believe the judgment must be reversed.

BAKER, J.